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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/594,377

08/26/2008

Alan Rory Mor McLeod

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03/28/2011

NuVasive  
c/o CPA Global  
P.O. Box 52050  
Minneapolis, MN 55402

EXAMINER

ECKMAN, MICHELLE

ART UNIT

PAPER NUMBER

3733

MAIL DATE

DELIVERY MODE

03/28/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/594,377	<b>Applicant(s)</b> MCLEOD ET AL.	
	<b>Examiner</b> MICHELLE ECKMAN	<b>Art Unit</b> 3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-30 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3, 25-27 is/are rejected.
- 7) ☒ Claim(s) 4-24 and 28-30 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

## **DETAILED ACTION**

### ***Information Disclosure Statement***

The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609.04(a) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

### ***Claim Objections***

Claims 4-24 and 28-30 are objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim cannot depend from any other multiple dependent claim. See MPEP § 608.01(n). Accordingly, the claims 2-24 and 28-30 have not been further treated on the merits.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3 and 25-27 are rejected under 35 U.S.C. 102(b) as being anticipated by Baumgartner (US 5,702,454, hereinafter "Baumgartner"). Baumgartner shows:

Regarding claim 1, a spinal implant, the implant including a porous component (i.e. woven fabric bag, see lines 20-37 of column 4, see also annotated Fig. 3 below)

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and one or more filling elements provided within the porous component (i.e. support members, see lines 20-37 of column 4, see also annotated Fig. 3 below).

Regarding claim 2, the implant is a partial nucleus pulposus replacement or a total nucleus replacement (see lines 49-53 of column 1).

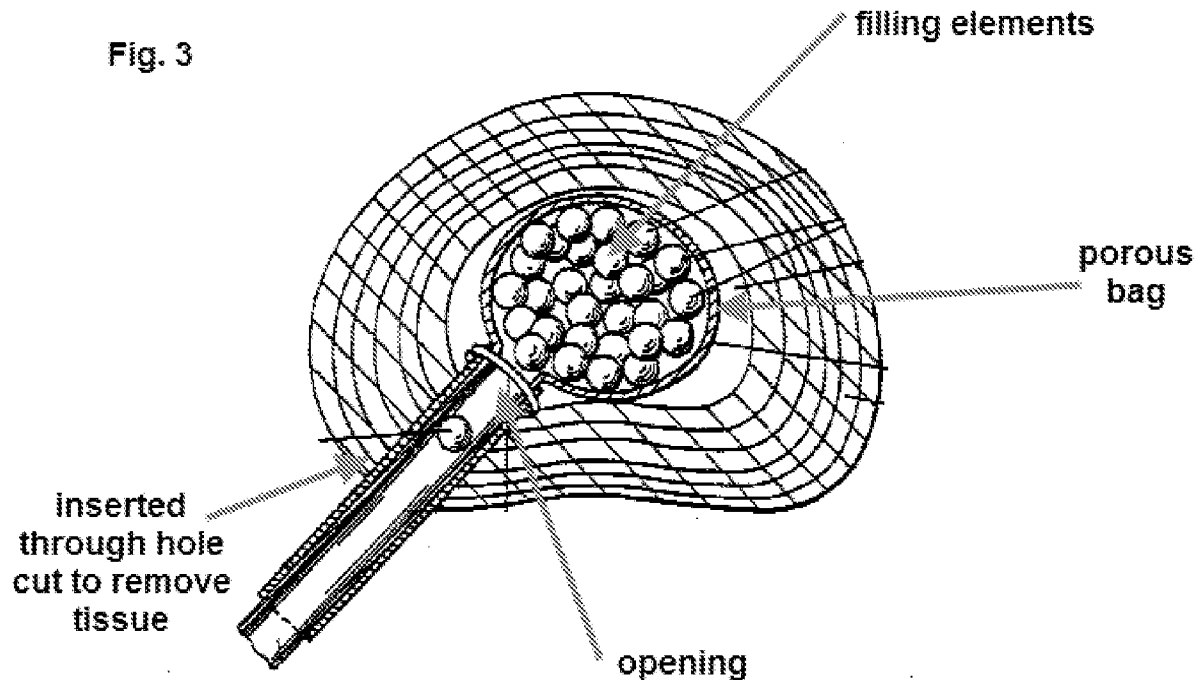
Regarding claim 3, the porous component is a bag or other form of container having an opening to permit the insertion of the one or more filling elements (see lines 58-67 of column 2 and lines 20-37 of column 4, note that there is an opening in the bag for filling the bag, see also annotated Fig. 3 below).

Regarding claim 25, a surgical technique in which, at least part of a spinal disc is removed (see lines 49-53 of column 1) and an implant is provided, the implant having a porous component and one or more filling elements provided within the porous component (see lines 58-67 of column 2 and lines 20-37 of column 4, see also annotated Fig. 3 below).

Regarding claim 26, the porous component is inserted through the same incision as is used to remove the nucleus material and the incision is only as large as needed for the nucleus material removal stage and the one or more filling elements are provided through the incision used to remove the nucleus material, the incision used for introducing the one or more filling elements being no larger than the incision necessary for the removal of the nucleus material (see lines 20-37 of column 4, note that the bag is inserted into the cavity created by removing the tissue parts, see also annotated Fig. 3 below).

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Regarding claim 27, the one or more filling elements are introduced into the porous component, with the porous component already within the intervertebral disc space (see lines 20-37 of column 4, see also annotated Fig. 3 below).



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### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: Spertus (US 3,546,055 A), Henley (US 534,023 A), Kuslich (5,571,189 A), Bao (US 5,976,186 A), Ledergerber (US 6,187,043 B1), Hochschuler (US 2002/0058947 A1), Kuslich (2002/0077701 A1), Eisermann (US 2002/0123750), deBeer (2005/0015140 A1), Kuslich (US 2005/0055094 A1), Kitchen (US 7,604,653

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B2), Hudgins (US 7,618,457 B2), Zwirkoski (US 7,682,400 B2), Arnin (US 7,758,647 B2), McKay (US 7,887,593 B2).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHELLE ECKMAN whose telephone number is (571)270-7051. The examiner can normally be reached on Monday - Friday, 8:00AM-4:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo C. Robert can be reached on (571)272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/M. E./

Examiner, Art Unit 3733

/EDUARDO C. ROBERT/

Supervisory Patent Examiner, Art Unit 3733

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